

**UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29**

JACOBSON & CO., INC.
Employer

and

Case No. 29-RC-11262

**CARPENTERS LOCAL 52, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA**
Petitioner¹

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, a hearing was held before Richard Bock, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned Regional Director.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial

¹ The names of the parties appear as corrected at the hearing.

error and hereby are affirmed.²

2. The parties stipulated that Jacobson Co., Inc., herein called the Employer, is a domestic corporation with its principal office and place of business located at 1079 East Grand Street, P.O. Box 511, Elizabeth, New Jersey. It has been engaged in the building and construction industry as a drywall finishing contractor. During the past year, which period represents its annual operations generally, the Employer purchased and received at its Elizabeth facility, goods and supplies valued in excess of \$50,000 directly from points outside the State of New Jersey.³

Based on the parties' stipulation, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert

² The Hearing Officer properly rejected the Employer's offer of proof with respect to its argument that the voting eligibility formula set forth in *Daniel Construction Company, Inc.*, 133 NLRB 264 (1961), *as modified*, 167 NLRB 1078 (1967), should not apply to the instant case. According to the Employer, discarding the *Daniel* formula and relying on the Board's traditional eligibility criteria would result in a voting complement that is "more representative of the work force," because the Employer "has a steady crew of employees that it uses from job to job." In *Daniel*, the Board held that in construction industry elections, in addition to those employees meeting the Board's standard eligibility criteria, all bargaining unit employees who were employed for "at least 30 days in the 12-month period preceding the eligibility date for the election," or who "had some employment in that [12-month] period and who [were] employed for 45 days or more within the 24 months immediately preceding the eligibility date for the election," are eligible to vote if they have not "been terminated for cause [and did not] quit voluntarily prior to the completion of the last job for which they were employed." *Daniel*, 133 NLRB at 267; 167 NLRB at 1081.

The *Daniel* formula is tailored to the "intermittent nature of working conditions in the construction industry." *Daniel*, 133 NLRB at 266. It enfranchises "those employees who have a reasonable expectation of future employment...and thereby have a continuing interest in the Employer's working conditions," while at the same time excluding employees with only a negligible likelihood of future employment. *Daniel*, 167 NLRB at 1081. The Board subsequently modified the *Daniel* formula but then readopted it in *Steiny and Company, Inc.*, 308 NLRB 1323 (1992). Noting that construction employees continued to "experience intermittent employment," the Board "decided that the *Daniel* formula is applicable in all construction industry elections," finding "no reasonable, feasible, or practical means by which to distinguish among construction industry employers in deciding whether a formula should be applied." *Steiny*, 308 NLRB at 1326; *see also Brown & Root, Inc.*, 314 NLRB 19, 28 (1994). The only exceptions articulated by the Board in *Steiny* were (1) "where the employer clearly operates on a seasonal basis," and (2) where parties "stipulate not to use the Daniel formula." *Steiny*, 308 NLRB at 1328 n. 16; *see also Signet Testing Laboratories, Inc.*, 330 NLRB 1 (1999). Neither of these exceptions is relevant to the instant case.

Accordingly, I find that the eligibility formula set forth in *Daniel* and *Steiny* is applicable to the employees in the voting unit found appropriate herein.

³ The parties' revised commerce stipulation is attached hereto as Exhibit 1.

jurisdiction in this case.

3. Carpenters Local 52, United Brotherhood of Carpenters and Joiners of America, a labor organization, herein called Petitioner, claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.⁴

⁴ The Employer moved to dismiss the petition, in light of an ongoing jurisdictional dispute that appears to encompass the work performed by the petitioned-for bargaining unit. The jurisdictional dispute is governed by an agreement between the Building Trade Employers' Association ("BTEA") and the Building and Construction Trades Council of Greater New York ("Trades Council"), referred to as the New York Plan for the Settlement of Jurisdictional Disputes (the "New York Plan"). A March 17, 2005, Order of the United States District Court for the Eastern District of New York ("Eastern District"; "District Court"), enforcing the New York Plan, orders that all drywall finishing work at construction jobs in New York City be assigned to Drywall Tapers and Pointers of Greater New York, Local 1974, International Brotherhood of Painters and Allied Trades, AFL-CIO ("Local 1974"). Further, the March 17, 2005, Order enjoins Local 530, Operative Plasterers' and Cement Masons' International Association ("Local 530"), a "gangster-funded, employer-friendly union local" with a history of violating the New York Plan and District Court orders enforcing it, from performing such work (with limited exceptions).

On June 8, 2005, Local 1974 filed a Complaint in the Eastern District in *Drywall Tapers Local 1974 v. Bovis Lend Lease Interiors et al.*, 05-CV-2746 (JG). The Complaint alleges that the defendant companies violated the New York Plan by subcontracting drywall finishing work to employers that do not have collective bargaining agreements with Local 1974. Subsequent to the March 17, 2005, Order, the work at issue in this ongoing lawsuit (previously performed by Local 530) was performed by members of the newly-chartered Petitioner, which is not a party to the New York Plan. Pursuant to a Memorandum and Order, issued by the Eastern District on September 9, 2005, the defendant companies will be enjoined from assigning drywall finishing work at New York City job sites to any company that does not have a collective bargaining agreement with Local 1974, unless the defendants can prove in an evidentiary hearing that they are not bound by the New York Plan. The record does not reveal whether the Employer is a member of the BTEA, or whether it is bound by the New York Plan. Local 1974 has declined to intervene in the instant proceeding, and has not taken a position on whether the petition should be dismissed.

Despite the troubling issues raised by the ongoing District Court litigation, the Eastern District has not enjoined the Board from processing petitions filed by labor organizations other than Local 1974. The March 17, 2005, Order, and the September 9, 2005, Memorandum and Order, do not nullify Section 7 of the Act, or preclude a majority of the Employer's employees from selecting a labor organization other than Local 1974 as their exclusive collective bargaining representative, if they so choose, pursuant to Section 9(a) and (c) of the Act. Indeed, the September 9, 2005, Memorandum and Order specifically states that "the freedom of employees to join or not to join labor organizations is unaffected." The Employer's motion to dismiss does not cite any other legal authority. Accordingly, the Employer's motion to dismiss is denied.

5. The parties stipulated, and I find, that the following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time mechanic drywall finishers and apprentice drywall finishers employed by the Employer out of its 1079 East Grand Street, Elizabeth, New Jersey facility, but excluding all other employees, clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Local 52, United Brotherhood of Carpenters and Joiners of America. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are employees in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off.

Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. Also eligible are (a) employees in the unit who were employed for at least 30 days in the 12-month period preceding the eligibility date for the election, and (b) employees in the unit who had some employment during that 12-month period and were employed for at least 45 days within the 24 months immediately

preceding the eligibility date for the election.⁵ In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on

⁵ *Steiny and Company, Inc.*, 308 NLRB 1323 (1992); *Daniel Construction Company, Inc.*, 133 NLRB 264 (1961), *as modified*, 167 NLRB 1078 (1967).

the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **December 6, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **December 13, 2005**. The request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: www.nlr.gov.

Dated: November 29, 2005.

Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
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